United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

75-1229

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

POCONO INTERNATIONAL CORPORATION and CHARLES GOLDBERG,

Defendants-Appellants.

PETITION FOR REHEARING

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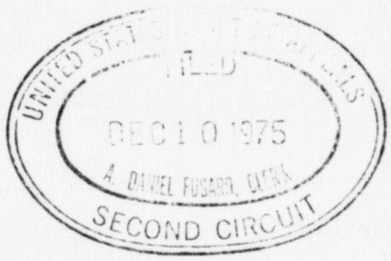

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75- 1229
SEPTEMBER TERM 1975

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

POCONO INTERNATIONAL CORPORATION and
CHARLES GOLDBERG,

Defendants-Appellants.

PETITION FOR REHEARING

This is a petition for rehearing by defendant Charles Goldberg, for reconsideration of the Court's decision dated November 26, 1975, affirming judgments of convictions of defendants Goldberg and Pocono International

Corporation ("Pocono") entered by the Honorable Charles L. Brieant, of the United States District Court for the Southern District of New York, after a jury trial. Defendants were convicted of mail fraud, 18 U.S.C. §1341, and violation of the antifraud and registration provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 et seq.

It is respectfully submitted that the Court erred in concluding that the false representations were made by Goldberg and further erred in failing to recognize the significance of the error by the District Court below in refusing to give a pivotal instruction to the jury concerning the testimony of Norman Failla, the key witness against Goldberg on the registration counts.

With respect to the fraud counts, the Court's interpretation of the applicable regulation of the Pennsylvania Department of Environmental Resources ("DER") does not comport with the overall intent on language of the regulations or the statute under which they were promulgated nor is there any factual basis in the record to support a finding of fraud. The regulations, as thus unforseeably and retroactively expanded by an unforseeable judicial interpretation, are unconstitutional for failure to give fair warning of the crime charged.

Goldberg was an officer of Pocono, a corporation

engaged in selling land for recreational or second homes. At trial it was established that lots sold to seven purchasers required sewage disposal systems employing above ground sand filters, known as "turkey mounds". The Government argued that Goldberg falsely represented that such systems could be approved by local authorities, as opposed to state authorities, relying on the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1 and the DER regulations promulgated thereunder.

The Court accepted the Government's argument on the following theory:

> "Where no standards had yet been adopted by the DER for a particular type of system (such as a turkey mound or other exotic method of sewage disposal) it was reasonable and in accordance with the policy and purpose of the Act to interpret it as requiring approval of such a system by the DET as the agency vested with authority to establish state-wide controlling standards." Opinion p. 12

To the contrary, however, it is clear from a precise reading of the Pennsylvania Sewage Facilities Act and § 73.11 (a) and 73.61 of the regulations that just the opposite is true. Those regulations provide in great detail for approval by the DEP of a long list of various

sewage disposal systems, yet are poignantly silent as approval of turkey mounds. In view of the express provision that all applications for permits are to be made to the township in the first instance, it simply cannot be said that the DER's silence amounts to a requirement that its prior approval be obtained for turkey mounds. The plain fact is that nothing having the force or effect of law required DER approval for turkey mounds, and the township had full power to approve such systems at all times.

The Government's showing at trial that DER personnel unofficially claimed the right to require prior approval of turkey mounds cannot be elevated to the force and effect of law. The alleged falsity of Goldberg representation cannot be made out on a mere showing that the DER could have, or would have, exercised its authority to require its prior approval, when in fact it did not. Moreover, the Government's statement, made for the first time in its brief on appeal, that township officials in practice refused to issue such permits amounts to nothing more than a conclusory allegation wholly unsupported by the record. The Government did not call a single township official as a witness. The Court's reliance on the

alleged practice of local officials (Opinion, page 9) in sustaining Goldberg's convictions in thus misplaced.

Nor does the testimony of Michael, Pocono's engineer, establish the falsity of Goldberg's representations. While Michael stated at trial that he told Goldberg DER approval would be required for systems to deal with certain soil conditions (Tr. 416), the plain fact is that he was mistaken in his opinion. Goldberg's knowledge that Michael believed DER approval was required, when in fact as a matter of law it was not, does not establish the falsity of the representations made.

Moreover, what the Court characterized as the materiality of these representations (Opinion pages 5-6) was never established at trial. Assuming, arguendo, that DER approval was required, there was no evidentiary basis upon which to conclude that purchasers would encounter any additional difficulties in installing a sewage system if a state permit, as opposed to a local permit, was required. There is nothing in the record to support the Court's conclusion that township approved sewage systems would be more effective, relatively trouble-free and inexpensive than state approved systems, or that the

latter would involve substantial delay, difficulty and additional expense to purchasers. The allegations that the alleged misrepresentations were material are solely a fabrication by the Government, consisting once again of nothing more than conclusory allegations in its brief.

Equally significant to the fact that Goldberg did not represent that sewage disposal systems costing $600 each would be approved by Penn Forest Township, contrary to the Court's reading of the Property Report (Opinion page 13). As the Property Report (App. 156) makes quite clear, purchasers were advised that

> "Sewage disposal is provided by septic tanks to be constructed by the buyer at the estimated average cost of $600.00, under present price levels. Developer has been advised by its consulting engineer that such method of sewage disposal is acceptable for the subdivision under current state and local health regulations. Developer has also been advised that in some instances additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank. Such additional work may bring the total cost of sewage facilities to $1,200."(Emphasis Supplied.)

The record also totally fails to support the alleged falsity of the caveat contained in the Property

Report, to the effect that sand filters costing up to $1,200 might be necessary. A turkey mound is precisely such a said filter as described, and there was no evidence in the record whatsoever that the cost of installing such a system would, or ever did, exceed $1,200.

In short, it is submitted that the record, briefs and argument amply demonstrate that Goldberg did not make any false representations. Rehearing to permit the Court's full attention to be focused at this point is appropriate.

With respect to the registration counts, it is respectfully submitted that the Court overlooked the crucial and vital significance of an erroneous refusal for an instruction by the District Court concerning the creditability of the witness Failla, whose testimony related solely to that issue. Failla's trial testimony that he advised Goldberg that the registration was not effective was in direct conflict with his prior testimony before the Grand Jury. Judge Brieant himself highlighted these contradictions, set forth in detail in Appellant's brief (pages 49 to 56). As counsel additionally pointed out at oral argument, Judge Brieant fully realized the

seriousness of Failla's changed testimony in stating that there was reason to believe he committed perjury in making false declarations under oath in violation of Title 18 U.S.C. §1623 (Tr.342).

Judge Brieant obviously considered the registration charge the most serious of all, as reflected in his comments at sentencing hearing (App. 143- 144) and in sentencing Goldberg to imprisonment on the registration counts while only placing him on probation on the fraud counts. Yet in refusing counsel's specific request that the jury be instructed that they might consider these glaring contradictions in evaluating the weight of Failla's testimony, Judge Brieant all but condemned Goldberg to certain conviction. Refusing to point out that the triers of fact might consider those very factors which lead the judge himself to conclude Failla was "one of the most disgraceful witnesses its been my privilege to enjoy in my short career here . . ." /(Tr. 320) and was probably perjuring himself at trial, was clearly prejudicial and reversible error. Accordingly, rehearing should also be granted to enable Goldberg to fully focus the Court's attention on the magnitude and effect of this highly prejudicial error

which was not taken into account in the Court's decision.

For all of the foregoing reasons, it is respectfully requested that this petition for rehearing by Goldberg be granted, and upon further consideration the fraud counts be dismissed and a new trial ordered on the registration counts.

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Due and timely service of TWO copies
of the within PETITION is hereby
admitted this 10TH day of DECEMBER 1975

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Attorney for APPELLEE